

**IN THE SUPREME COURT  
APPEAL FROM THE COURT OF APPEALS  
JUDGES: RICHARD ALLEN GRIFFIN, MARK J. CAVANAGH  
AND KAREN FORT HOOD**

FORD MOTOR COMPANY,

Petitioner-Appellant,

v

BRUCE TOWNSHIP,

Respondent-Appellee.

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Supreme Court No. 127424

Court of Appeals No. 246579

Michigan Tax Tribunal No. 288822

FORD MOTOR COMPANY,

Petitioner-Appellant,

v

CITY OF WOODHAVEN and COUNTY OF WAYNE,

Respondents-Appellees.

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Supreme Court No. 127422

Court of Appeals No. 246378

Michigan Tax Tribunal No. 294958

FORD MOTOR COMPANY,

Petitioner-Appellant,

v

CITY OF STERLING HEIGHTS,

Respondent-Appellee.

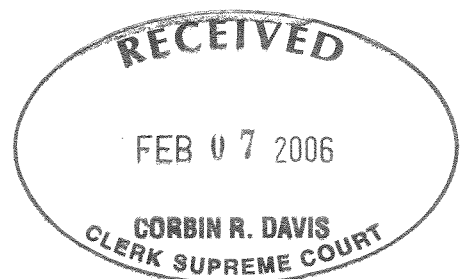
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Supreme Court No. 127423

Court of Appeals No. 246379

Michigan Tax Tribunal No. 294924

**APPELLANT'S REPLY BRIEF**



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## I. INTRODUCTION

Petitioner-Appellant Ford Motor Company ("Ford") made mistakes in its personal property reporting. It consequently paid substantially more taxes than it lawfully owed. Appellees received substantially more taxes than they were lawfully entitled. In a dissent which this Court later adopted, Justice Smith described this situation as "grotesque" and "repellent."<sup>1</sup> Judge O'Hara similarly concluded in Wolverine Steel that:

The situation here presented [mistaken over reporting of personal property] is one which the Legislature intended to correct when it used the phrase 'mutual mistake of fact' in [MCL 211.53a].... I think the taxpayer should get his money back. Anything less would be unconscionable. To avoid this result is the intendment of the statute.<sup>2</sup>

The Tax Tribunal's decision to the contrary below, and the majority opinion of the Court of Appeals affirming it, are infested with errors of law and wrongly applied principles. Appellees' Briefs on Appeal, to which this brief replies, woefully fail to validate these decisions, or to rebut the compelling arguments in Ford's December 14, 2005 Brief on Appeal and in Judge Griffin's dissenting Court of Appeals opinion below.

## II. ARGUMENT

### A. **The Same Mistaken Belief Shared By Both Parties Caused The Excessive Assessment And Payment**

Appellees rely on the unpublished Court of Appeals holding in General Products:

Here there was no mutuality because petitioner's mistake was based on its incorrect inventory and analysis of its property. The assessor's mistake was based on petitioner's representations on its personal property

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<sup>1</sup> Consumers Power Co v Muskegon Co, 346 Mich 243, 251, 256; 78 NW2d 223 (1956) (Smith, J., dissenting) (later adopted as law by Spoon-Shackett Co, Inc v Oakland Co, 356 Mich 151; 97 NW2d 25 (1959)).

<sup>2</sup> Wolverine Steel Co v Detroit, 45 Mich App 671, 676-678; 207 NW2d 194 (1973) (O'Hara, J., dissenting). Judge O'Hara was the chief judge of the three member Court of Appeals panel in Wolverine Steel and a former Supreme Court Justice sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23.

statement. Thus, there was a different basis for each of the two mistakes made.<sup>3</sup>

The majority of the Court of Appeals below adopted a similar construct:

[T]he assessor's 'mistake of fact' was his erroneous belief that [Ford's] disclosure of property was accurate. [Ford's] 'mistake of fact' was its erroneous belief that it owned specific property that was taxable. Because the assessing officer and [Ford] were not operating under the same mistake of fact, a refund under MCL 211.53a was not available....<sup>4</sup>

**These constructions erroneously create a distinction without a difference.** An inadvertant erroneously prepared personal property statement is the manifestation, the reporting and the embodiment of the taxpayer's mistaken belief regarding its personal property. The majority opinion of the Court of Appeals below and the Court of Appeals decision in General Products essentially hold that disclosure is different than the subject disclosed or, put another way, that reliance upon a document is different than reliance upon the information contained in the document. **However, reliance by the assessor upon a personal property statement is the same as reliance upon the taxpayer's beliefs reflected in that statement.**

Ford's mistaken belief that it owned and was taxable on property it reported on its personal property statement is the same mistaken belief the assessing officer reaches through his reliance on Ford's statement. In each of these cases, that shared belief caused the assessor's over assessment and Ford's overpayment. Judge Griffin correctly so concluded in his dissenting Court of Appeals opinion below:

Here, both parties shared the same mistake of fact. They mistakenly believed that all of the property listed on the personal property statement was taxable to [Ford], when it was not.... Both parties mutually relied on this factual mistake: respondent relied on the mistake to assess the property and enforce the tax, and [Ford] relied on the mistake in paying

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<sup>3</sup> General Products Delaware Corp v Leoni Twp, et al, unpublished opinion per curiam of the Court of Appeals, decided May 8, 2003 (Docket No. 233423), p 4 (attached as Exhibit C to Ford's December 14, 2005 Brief on Appeal).

<sup>4</sup> Appellant's Appendix at 55a, 69a, 77a.

the tax. Therefore, the parties committed a mutual mistake of fact that was intended to be remedied by the Legislature.<sup>5</sup>

#### **B. The Assessing Officer Need Not Audit The Personal Property Statement**

In General Products, the Court of Appeals made the following reference to and analysis of the Restatement of Restitution's definition of mistake:

'There may be ignorance of a fact without mistake as to it, since mistake imports advertence to facts and one is ignorant of many facts as to which he does not advert.' Here, the assessor based the assessment on the personal property statement, thus he was ignorant of the real facts and did not have a state of mind that allowed for a mutual mistake of fact.<sup>6</sup>

The Court of Appeals in General Products held that the assessing officer must have "an actually held belief" that the taxpayer's personal property statement is accurate; the taxpayer's erroneous belief in the accuracy of the statement cannot be "imputed" to the assessing officer.<sup>7</sup> In the same vein, Appellee City of Sterling Heights asserts that there must be "specific contemplation through thoughtful observation," and not "simply a casual ordinary review," by the assessing officer.<sup>8</sup>

As Ford has described, an assessor mistakenly believes an incorrect personal property statement is correct merely by assuming that to be the case; the assessor need not thoughtfully contemplate the statement and affirmatively conclude it is accurate.<sup>9</sup> Black's Law Dictionary (7<sup>th</sup> ed, 1999), p 1017 (defining "mistake" as an erroneous belief, and stating that "[t]he belief need not be an articulated one, and a party may have a belief as to a fact when he merely makes an assumption with respect to it....") Lenawee Co, a contract law case the Court of Appeals General Products, decision relies upon, actually supports Ford.<sup>10</sup>

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<sup>5</sup> Appellant's Appendix at 62a, 73a, 81a.

<sup>6</sup> Exhibit C to Ford's December 14, 2005 Brief on Appeal, p 3.

<sup>7</sup> Id, p 4.

<sup>8</sup> Appellee City of Sterling Heights January 17, 2006 Brief on Appeal, pp 11, 12.

<sup>9</sup> Ford December 14, 2005 Brief on Appeal, pp 31-32.

<sup>10</sup> Lenawee Co Bd of Health v Messerly, 417 Mich 17; 331 NW2d 203 (1982).

There a sale of residential rental property was voided due to mutual mistake of fact, where a defective septic tank, installed by a former owner, rendered the property uninhabitable. Critically, neither the buyer nor the seller affirmatively concluded the septic tank it was operable; they merely “erroneously assumed that the property...was suitable for human habitation and could be utilized to generate rental income.”<sup>11</sup>

Furthermore, assessors are required to ascertain and certify the existence and true cash value of property, and to make assessments based on that value.<sup>12</sup> Assessors also are required to use independent judgment in computing property values; they are prohibited from automatically accepting the taxpayer’s calculations.<sup>13</sup> A violation of these legal duties constitutes criminal conduct.<sup>14</sup> An assessor is required to formulate, and must be deemed to in fact formulate, a belief in the accuracy of a personal property statement on which each assessment is based. In fulfilling their statutory obligations, Appellees’ assessors relied on Ford’s personal property statements. Thus, even the majority of the Court of Appeals below held that Appellees’ assessors formulated an “erroneous belief that [Ford’s] disclosure of property was accurate.”<sup>15</sup>

### **C. The Parties Are Not Required To Stipulate To A Mistake**

In Consumers Power, this Court’s majority and dissenting opinions repeatedly characterized as a mutual mistake of fact (i) an inadvertant excessive assessment by the assessing officer, coupled with (ii) payment by the taxpayer of the excessive tax without knowledge of the error.<sup>16</sup> The present cases involve these same two elements and these mutual mistakes are correctable under MCL 211.53a (“section 53a”).

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<sup>11</sup> Id at 30-31.

<sup>12</sup> Const 1963, art 9, § 3, MCL 211.10d(7); 211.19(1), (2); 211.24(1)(f); 211.27a; 1979 ACS 9, R 209.26(2), (5), (7), (8).

<sup>13</sup> MCL 211.24(1)(f); State Tax Commission Bulletin No. 12 of 1999.

<sup>14</sup> MCL 211.10d(9); 211.116; 211.119.

<sup>15</sup> Appellant’s Appendix at 55a, 69a, 77a.

<sup>16</sup> Consumers Power is discussed at length in Ford’s December 14, 2005 Brief on Appeal, pp 15-22.

Indeed, section 53a was enacted just two years after the Consumers Power decision to provide statutorily the restitution the case held was not then available.<sup>17</sup>

Bruce Township fruitlessly attempts to minimize the significance of Consumers Power and the legislature's enactment of section 53a in response. The Township asserts that this Court either did not mean what it said in Consumers Power or was wrong in repeatedly characterizing the case's fact pattern as a mutual mistake of fact. See Bruce Township January 13, 2006 Brief on Appeal, p 7 ("referring to the...error which occurred in Consumers Power as a mutual mistake of fact is inconsistent with the facts of Consumers Power.")) In Bruce Township's view, there is a mutual mistake of fact only if the assessor and taxpayer stipulate that the assessment and payment were inadvertently erroneous:

A more plausible explanation for the [Consumers Power Court's] use of the term 'mutual mistake' was that both the city assessor and taxpayer conceded that a mistake had been made in the assessment and resultant payment of the tax.... The end result with regard to the use of the terminology 'mutual mistake of fact' in Consumers Power, MCL 211.53a, and MCL 211.53b is that there must be consent, a stipulation between the assessor and the taxpayer that a mistake occurred.<sup>18</sup>

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<sup>17</sup> Section 53a provides as follows:

Any taxpayer who is assessed and pays taxes in excess of the correct and lawful amount due because of a clerical error or mutual mistake of fact made by the assessing officer and the taxpayer may recover the excess so paid, without interest, if suit is commenced within 3 years from the date of payment, notwithstanding that the payment was not made under protest.

<sup>18</sup> Id at 7, 9-10. A mutual mistake of fact (or a clerical error) is correctable under MCL 211.53b ("section 53b") only if "verified by the local assessing officer and approved by the board of review." MCL 211.53b(1). However, neither that language nor any stipulation, consent or approval requirement is in section 53a's words. Although Bruce Township does not explicitly so acknowledge, it is employing the *pari materia* statutory construction doctrine to superimpose onto section 53a the section 53b assessor verification and board of review approval requirements. This is even more erroneous than employing the doctrine to superimpose onto section 53a the limitations on the type of mutual mistakes of fact and clerical errors correctable under section 53b. See discussion *infra* at pages 8-10 in section II, E of this brief.

To further support its alleged section 53a stipulation requirement, Bruce Township cites Delta Airlines, Inc v Romulus, unpublished opinion per curiam of the Court of Appeals, decided August 2, 2002 (Docket No. 225881) (attached as Exhibit E to Ford's December 14, 2005 Brief on Appeal), where a mistaken assessment and payment stipulated to by the parties was held to be a section 53a – correctable mutual mistake of fact. However, Delta Airlines did not hold that section 53a relief is conditioned upon the parties stipulating to the mistake. It merely held that there is a section 53a – correctable mutual mistake of fact where "the parties agree that the tax was mistakenly assessed and mistakenly paid and...there is no evidence to the contrary...." Id at 3.

Bruce Township's "analysis" is incorrect. Consumers Powers' characterization of a mistaken excessive assessment and payment as a mutual mistake of fact had nothing to do with the parties' agreeing there was such a mistake. If there is a mutual mistake of fact, the parties' failure to so stipulate is inconsequential. **Were Bruce Township's interpretation correct, an assessing officer could render section 53a relief unavailable simply by refusing to stipulate to or acknowledge an error. The Legislature did not intend to, and its language in section 53a does not, give assessors the power to refuse to return unlawful excessive tax collections.**<sup>19</sup>

**D. Section 53a Applies To Personal Property Notwithstanding Other Possible Remedies**

The majority opinion of the Court of Appeals below and the Court of Appeals General Products decision precludes personal property from qualifying for section 53a relief, contravening clear statutory language that applies to all property, real and personal, as the legislature intended.<sup>20</sup> As Judge Griffin said in his separate Court of Appeals opinion below:

The Tribunal's definition of mutual mistake is excessively narrow. It would effectively eliminate personal property from the protection of MCL 211.53a.<sup>21</sup>

In Ravenna, the Court of Appeals held that personal property, including errors in personal property reporting, cannot be excluded from section 53a relief: "[t]o the extent that the MTT's decision states that

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<sup>19</sup> Bruce Township also states that "[t]he Consumers Power court did not engage in defining "mutual mistake of fact" and appeared to use the term in a general sense...." Bruce Township January 13, 2006 Brief on Appeal, p 6. This is the very point Ford makes in its December 14, 2005 Brief on Appeal, pp 15-23. The plain and ordinary meaning of "mutual mistake of fact" is clear and unambiguous. Judicial construction and analysis of the term's meaning is neither necessary nor permitted. Sun Valley Foods Co v Ward, 460 Mich 230, 236-237; 596 NW2d 119 (1999). **The majority opinion of the Court of Appeals below and the Court of Appeals General Products decision impermissibly engage in a "hypertechnical definition of 'mutual mistake' [which] contorts the phrase's plain meaning."** Ravenna Casting Center v Ravenna Twp, unpublished opinion per curiam of the Court of Appeals, decided May 6, 2004 (Docket No. 242286) (Attached as Exhibit G to Ford's December 14, 2005 Brief on Appeal) (O'Connell, J., dissenting opinion, pp 1-2).

<sup>20</sup> See Ford's December 14, 2005 Brief on Appeal, pp 34-37.

<sup>21</sup> Appellant's Appendix at 61a, 73a, 81a.

such statements can never provide the source of a mutual mistake of fact, it is in error.”<sup>22</sup> Moreover, the Court of Appeals in Wolverine Steel specifically held that personal property reporting errors are correctable under section 53a: “§53a alludes to questions of whether or not the taxpayer has listed all of its property, or listed property that it had already sold or not yet received, etc.”<sup>23</sup>

Appellees do not refute, and indeed they acknowledge, that the majority opinion of the Court of Appeals below and the Court of Appeals General Products decision exclude personal property from section 53a relief. Bruce Township attempts to justify this exclusion by alleging that other remedies, such as under MCL 211.154 (“section 154”), are available for personal property reporting errors; indeed, it asserts that section 154 is better for the taxpayer than section 53a because interest is paid on a refund obtained under the former, but not under the latter, provision.<sup>24</sup>

Bruce Township’s alternative remedy argument fails for the many reasons set forth in Ford’s December 14, 2005 Brief on Appeal, pp 45-46, including in particular that personal property misreporting is covered by the plain, ordinary and commonly understood meaning of the language of section 53a. Moreover, when Ford timely filed these actions, section 154 relief was not available to it, lest Ford would have sought section 154 relief and the associated additional benefit of interest on the refund.

Appellees City of Woodhaven and Wayne County note that on December 7, 2005, the Michigan House of Representatives passed a bill to amend section 53a to explicitly cover personal property reporting errors.<sup>25</sup> The House would not have passed this bill if it believed section 154 (and other alleged alternative) relief were sufficient.

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<sup>22</sup> Attached as Exhibit G to Ford’s December 14, 2005 Brief on Appeal, p 4.

<sup>23</sup> 45 Mich App 671, 674.

<sup>24</sup> See Bruce Township January 13, 2006 Brief on Appeal, pp 1, 2, 16-17.

<sup>25</sup> See City of Woodhaven and Wayne County January 11, 2006 Brief on Appeal, Exhibit 2. Ford contends that this bill is not intended to change current law, but rather to provide confirmation and

A taxpayer can recover excessive taxes paid within three years of instituting a section 53a action; the refund period for a section 154 action is shorter; the current year and the two prior years.<sup>26</sup> Appellees Woodhaven and Wayne County try to justify denial of section 53a relief to personal property because, due to its moveable nature, “it would be impossible to turn back the clock more than three years to allow assessors to determine whether personal property was in fact misreported years earlier.”<sup>27</sup> However, Ford acknowledges it has the burden of proving its personal property misreporting allegations, and specifically asks this Court to remand these cases to the Tax Tribunal so that it can do so. Moreover, the bill passed by the House of Representatives on December 7, 2005, explicitly acknowledging that section 53a applies to personal property misreporting, reflects a repeated legislative determination that the three year section 53a refund period is appropriate.<sup>28</sup> This Court should enforce the plain statutory language of section 53a.

**E. Section 53a Is Not Limited To Typographical, Transpositional Or Mathematical Errors**

Section 53a contains no language that limits the types of mutual mistakes of fact (or clerical errors) correctable thereunder.<sup>29</sup> However, section 53b provides very limited relief only for mutual mistakes of fact (or clerical errors) that relate **“to the correct assessment figures, the rate of taxation, or the**

clarification of current law necessitated by the Court of Appeals’ and Tax Tribunal’s erroneous application of section 53a, which has violated the legislature’s intent.

<sup>26</sup> MCL 211.53a; 211.154(1).

<sup>27</sup> City of Woodhaven and Wayne County January 11, 2006 Brief on Appeal, p 6.

<sup>28</sup> Bruce Township also asserts that an alternative remedy for personal property misreporting is available under MCL 211.30 and section 53b (as well as under section 154). MCL 211.30 permits an assessment to be protested at the local board of review meetings which are generally scheduled less than a month after the due date of the personal property statement and within weeks of the issuance of the personal property notice of assessment. MCL 211.30; 211.19(2); 1979 ACS 9, R 209.26(7). The board of review protest under MCL 211.30 is obviously not a realistic, meaningful alternative remedy as a taxpayer is very unlikely to discover his personal property misreporting in so short a time. Section 53b relief also is not an available alternative to section 53a relief; if personal property misreporting is not a section 53a – correctable mutual mistake of fact, it would not qualify as one of the more limited types of mutual mistakes of fact correctable under section 53b. See section II. E. of this brief which follows.

<sup>29</sup> Section 53a is quoted in footnote 15 *supra*.

**mathematical computation relating to the assessing of taxes.”**<sup>30</sup> The emboldened language from section 53b, which does not appear in section 53a, has been interpreted to mean that the errors correctable under section 53b are only those of a typographical, transpositional or arithmetic nature.<sup>31</sup> The Court of Appeals 1973 Wolverine Steel decision held that section 53a and 53b are in *pari materia* and must be read together – i.e., section 53a applies only to the limited types of errors to which section 53b applies. Appellees Woodhaven and Wayne County note that:

Whether one agrees with the Wolverine Steel interpretation or not, it must be recognized that the interpretation has now been with us for over thirty years, and there has been no legislative action to clarify or change that interpretation.<sup>32</sup>

The *pari materia* argument fails for the many reasons specified in Ford’s December 14, 2005 Brief on Appeal, pp 38-44. Even the majority of the Courts of Appeals below rejected the argument:

The MTT also adopted that very narrow interpretation of MCL 211.53a..., declaring that MCL 211.53a is specifically limited in application to those special circumstances relieved under MCL 211.53b. **However,...such a restrictive interpretation of MCL 211.53a ignores the clear legislative intent not to so limit the types of ‘mutual mistakes of fact’ as evidenced by the omission of such provision. Neither we nor the MTT may engraft such a limitation.**<sup>33</sup>

Moreover, Wolverine Steel’s holding, that section 53a (even as limited to section 53b – correctable errors) applies to personal property misreporting, has now been with us for over thirty years without legislative

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<sup>30</sup> MCL 211.53b (emphasis added).

<sup>31</sup> International Place Apartments - IV v Ypsilanti Twp, 216 Mich App 104; 548 NW2d 668 (1996).

<sup>32</sup> City of Woodhaven and Wayne County January 11, 2006 Brief on Appeal, p 5. Appellees Woodhaven and Wayne County also rely on Colonial Woods Limited Dividend Housing Assoc v Detroit, unpublished opinion per curiam of the Court of Appeals, decided June 12, 2003 (Docket No. 239199) (Attached as Exhibit 1 to City of Woodhaven and Wayne County January 11, 2006 Brief on Appeal); which applied the *pari materia* doctrine to limit section 53a – correctable errors to those correctable under section 53b.

<sup>33</sup> Appellant’s Appendix at 57a-58a, 72a, 80a (emphasis supplied and internal quotations omitted). Judge Griffin reached the same conclusion in his separate Court of Appeals opinion below. Appellant’s Appendix at 61a, 73a, 81a. (“In construing a statute, the omission of a provision in one statute included in another statute is presumed intentional.”)

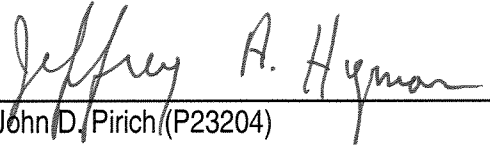
change: "section 53a alludes to questions of whether or not the taxpayer has listed all of its property, or listed property that it had already sold or not yet received, etc."<sup>34</sup>

### III. CONCLUSION AND RELIEF REQUESTED

For each of the many reasons discussed above and in Ford's December 14, 2005 Brief on Appeal, the majority opinion of the Court of Appeals below clearly constitutes error of law and application of wrong legal principles. Ford respectfully requests that this Honorable Court enter an Order determining that Ford is entitled to relief under section 53a with respect to all the properties for which Ford seeks relief, REVERSING the majority opinion of the Court of Appeals below, and REMANDING the cases to the Tax Tribunal for further proceedings consistent with such Order.

Respectfully submitted,

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<sup>34</sup> 45 Mich App 671, 674. Appellees Woodhaven and Wayne County also error in relying on Colonial Woods. That unpublished Court of Appeals decision involved an alleged clerical error, not mutual mistake of fact, and it did not involve personal property or misreporting thereof. Moreover, in Colonial Woods the Court of Appeals cites the Black's Law Dictionary definition of "clerical error" as "a ministerial mistake," and then reaches the oxymoronic conclusion that the error involved in the case is not a clerical error because it is a ministerial mistake. See Exhibit 1 to City of Woodhaven and Wayne County January 11, 2006 Brief on Appeal, pp 2, 3.